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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Mi Familia Vota, et al., Plaintiffs, v. Katie Hobbs, et al., Defendants.	No. 2:22-cv-00509-SRB (Lead Case) No. 2:22-cv-01124-SRB (Consolidated) United States' Response to Motion to Dismiss
Living United for Change in Arizona, et al., Plaintiffs, v.	

Katie Hobbs,
Defendant,

and

State of Arizona, et al.,
Intervenor-Defendants.

Poder Latinx, et al.,
Plaintiffs,

v.

Katie Hobbs, et al.
Defendants.

United States of America,
Plaintiff,

v.

State of Arizona, et al.,
Defendants.

Democratic National Committee, et al.
Plaintiffs,

v.

State of Arizona, et al.,
Defendants,

and

Republican National Committee,
Intervenor-Defendant.

INTRODUCTION

In 2013, the United States Supreme Court held that federal law barred Arizona from requiring voter registration applicants using a uniform federal voter registration form ("Federal Form") to submit documentary proof of citizenship ("DPOC"). *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 20 (2013) ("*ITCA*"). Soon after, the U.S. Election Administration Commission ("EAC") confirmed that DPOC was not necessary for states to determine whether someone is eligible to vote in federal elections and declined to add the requirement to the Federal Form.

Defying that precedent and bedrock authority establishing Congress's power to regulate *all* federal elections, Arizona's new election law—House Bill 2492 ("HB 2492")—again requires some Federal Form registrants to provide DPOC to be able to vote in presidential elections. It may not do so. The National Voter Registration Act of 1993 ("NVRA") requires Arizona to permit voters to register to vote in all federal elections, including those for president, when using the Federal Form without providing DPOC. HB 2492 thus violates the NVRA. HB 2492 also violates the Civil Rights Act of 1964 ("CRA") by requiring election officials to reject voter registration forms for simple errors or omissions that are not material to establishing a voter's qualifications.

The United States' Complaint sufficiently alleges these NVRA and CRA violations. The State's motion to dismiss the United States' Complaint should be denied.

FACTUAL BACKGROUND

Arizona HB 2492 is an omnibus election law that restricts eligible U.S. citizens' ability to register and vote. HB 2492 goes into effect on January 1, 2023, and will impact

voters in the 2024 elections.

Section 4 of HB 2492 requires election officials to take specific steps to confirm the citizenship status of applicants who use the Federal Form to register to vote in federal elections, including comparing those applicants within certain databases. *See* Compl. ¶ 36, *United States v. Arizona*, No. 2:22-cv-01124 (D. Ariz.), ECF No. 1. If officials are unable to verify an applicant's citizenship status, they must notify the applicant, who must then provide DPOC. *Id.* ¶¶ 37-38. Applicants who fail to provide DPOC are denied the right to vote in presidential elections. *Id.* ¶ 39. These applicants also cannot vote by mail in congressional elections; their votes for U.S. Senate and House contests will only count if they vote in person. *Id.*

Section 4 further requires applicants who have already provided DPOC in registering to vote in either state or federal elections to also check "Yes" in response to a question on the Arizona state registration form ("State Form") regarding their citizenship status. *Id.* ¶¶ 57-58. Forms without this mark must be rejected, even though the applicant provided DPOC. *Id.* ¶¶ 57-58. Finally, Section 4 requires applicants using the State Form to provide their birthplace, or their application will be rejected. *Id.* ¶¶ 49-50.

Section 5 of HB 2492 prohibits even those who have already registered to vote in federal elections from voting in presidential elections or by mail if they have not produced DPOC. *Id.* ¶ 40.

Following HB 2492's enactment, the United States sued the State of Arizona and its Secretary of State to enforce Section 6 of the NVRA and the "Materiality Provision" codified in Section 101 of the CRA. The United States' Complaint alleges that Sections

4 and 5 of HB 2492 violate the NVRA by requiring federal-only voter[1] registration applicants to provide DPOC, which is more than what is necessary to prove their eligibility to vote in presidential elections or by mail. *Id.* ¶¶ 62-65.

The Complaint further alleges that Sections 4 and 5 of HB 2492 violate the Materiality Provision by requiring registration applications to be rejected on the basis of omissions or errors not material to an applicant's qualifications to vote. *Id.* ¶¶ 66-71. For example, the Complaint alleges that HB 2492 requires a state registration application to be rejected if the voter failed to state a birthplace or if the voter provided satisfactory DPOC but did not check the "Yes" box affirming citizenship. *Id.* ¶¶ 67-68. The Complaint also alleges that HB 2492 violates the Materiality Provision by requiring those seeking to vote in presidential elections or by mail, or those already registered to vote in such elections, to provide DPOC in addition to attesting to their citizenship. *Id.* ¶¶ 69-70.

The Secretary of State admits that "the challenged provisions of HB 2492" conflict with the NVRA and that the birthplace and checkbox provisions conflict with the Materiality Provision of the CRA. SOS Ans. ¶¶ 64, 67-68, ECF No. 122.

STATUTORY BACKGROUND

I. The National Voter Registration Act

Section 6 of the NVRA requires states to "accept and use" the Federal Form to register voters for federal elections, 52 U.S.C. § 20505(a), including presidential

[1] Those eligible to vote in both state and federal elections are referred to as "full-ballot voters" and those eligible to vote in only federal elections are referred to as "federal-only voters."

elections, *id.* §§ 20502(2), 30101(3). The Federal Form specifies that an applicant must be a citizen to vote in federal elections and requires applicants to attest to their citizenship under penalty of perjury. *Id.* § 20508(b)(2).

The EAC develops the Federal Form and prescribes its contents in consultation with the chief election officers of the states. *Id.* § 20508(a). The Federal Form contains "only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." *Id.* § 20508(b)(1). The NVRA thus forbids states "from requiring a Federal Form applicant to submit information beyond that required by the form itself," including DPOC. *ITCA*, 570 U.S. at 20 (rejecting Arizona's attempt to require Federal Form applicants to submit DPOC to be registered in federal elections).

II. The Materiality Provision of the Civil Rights Act

The Materiality Provision prohibits states from denying "the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). The Materiality Provision specifically covers registration. *Id.* § 10101(e); *see also id.* § 10101(a)(3)(A).

LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual

matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *see also In re Alphabet, Inc. Secs. Litig.*, 1 F. 4th 687, 693-94 (9th Cir. 2021). A motion to dismiss must be denied so long as the "plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable." *Iqbal*, 556 U.S. at 678.

ARGUMENT

I. The United States Has Stated a Claim That HB 2492 Violates Section 6 of the NVRA.

HB 2492's DPOC requirement conflicts with the NVRA's requirement that Arizona "accept and use" the Federal Form, and therefore Arizona's latest DPOC requirement is preempted. HB 2492's DPOC requirement is not beyond the NVRA's scope simply because it targets voters in presidential elections rather than congressional elections: An unbroken line of precedent confirms Congress's power to regulate *all* federal elections, including those for president. *See infra* Part I.B.

A. HB 2492's DPOC Requirement for Federal-Only Voters Violates Section 6 of the NVRA.

HB 2492 violates the NVRA because it requires federal-only voter applicants to provide more than is necessary—in this case, DPOC—to prove their eligibility to vote in presidential elections. *ITCA* bars that. 570 U.S. at 20 (holding that the NVRA

"precludes Arizona from requiring a Federal Form applicant to submit information beyond that required by the form itself"). The Federal Form requires applicants to attest under oath to their citizenship. The EAC has determined that is all that is necessary to establish a Federal Form applicant's citizenship. *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1196-98 (10th Cir. 2014), *cert. denied*, 576 U.S. 1055 (2015). The EAC alone makes that determination, which "acts as both a ceiling and a floor." *League of Women Voters of United States v. Newby*, 838 F.3d 1, 10 (D.C. Cir. 2016); *ITCA*, 570 U.S. at 18. Thus, as long as applicants in Arizona attest under oath that they are citizens and meet remaining Federal Form requirements, the NVRA requires Arizona election officials to accept and use that Form. *ITCA*, 570 U.S. at 9-13 (holding that the NVRA mandates that states accept the Federal Form "*as sufficient* for the requirement it is meant to satisfy"); 52 U.S.C. § 20505(a)(1).

Because the EAC has expressly rejected DPOC as a necessary requirement on the Federal Form to prove citizenship, Arizona cannot require it of federal-only applicants. *ITCA* cemented that principle in 2013; Arizona cannot flout it now. HB 2492 therefore violates the NVRA. Federal-only voters must be permitted to vote in *all* federal elections, including presidential elections, so long as those voters submit a complete and valid Federal Form.

B. Congress Possesses Broad Power to Regulate Presidential Elections.

The State concedes that Congress enacted the NVRA using its Elections Clause power. Mot. to Dismiss at 22, ECF No. 127; *see ITCA*, 570 U.S. at 8-9. But it argues that Congress lacks authority to regulate presidential elections. The State is incorrect.

As the Supreme Court has long recognized, Congress possesses power to enact laws governing presidential elections. *Buckley v. Valeo*, 424 U.S. 1, 13 n.16 (1976) (per curiam) ("The Court has also recognized broad congressional power to legislate in connection with the elections of the President and Vice President."); *see also Oregon v. Mitchell*, 400 U.S. 112, 124 (1970) (opinion of Black, J.) ("It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections."); *id*. at 124 n.7 ("[I]nherent in the very concept of a supreme national government with national officers is a residual power in Congress to insure that those officers represent their national constituency as responsively as possible. This power arises from the nature of our constitutional system of government and from the Necessary and Proper Clause."); *Burroughs v. United States*, 290 U.S. 534, 545 (1934) (holding that Congress "undoubtedly" possesses the "power to pass appropriate legislation to safeguard [presidential elections]" because such power is "essential to preserve the departments and institutions of the general government from impairment or destruction"). And in the course of upholding the NVRA, courts—including the Ninth Circuit Court of Appeals—have cited Congress's power to regulate presidential elections. *See Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1414 (9th Cir. 1995) ("The broad power given to Congress over congressional elections has been extended to presidential elections"), *cert. denied*, 516 U.S. 1093 (1996); *see also Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Miller*, 129 F.3d 833, 836 n.1 (6th Cir. 1996) (same); *ACORN v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995) (same); *see also, e.g.*, S. Rep. 103-6, at 4 (1993) ("Congress has the power to regulate Federal elections, including the establishment of

national voter registration procedures for Presidential and congressional elections."). The State ignores that authority.

That the Constitution confers upon Congress the power to regulate congressional elections in the Elections Clause does not detract from Congress's power to regulate presidential elections. The omission of presidential elections from the Elections Clause reflects that the framers did not contemplate that a presidential election would be conducted by popular vote in the way it is now. *See, e.g.*, *Chiafalo v. Washington*, 140 S. Ct. 2316, 2320-21 (2020) (explaining that the framers initially approved a system of presidential electors to elect the President, but this system evolved over time, until by 1832, nearly every state introduced popular voting for presidential elections); *McPherson v. Blacker*, 146 U.S. 1, 28 (1892) (explaining that the framers voted down a proposition that the President be elected by popular vote and instead left to the states the task of appointing electors). By Reconstruction, however, Congress recognized our system of popular voting, enacting Section 2 of the Fourteenth Amendment and later Section 1 of the Twenty-Fourth Amendment, both of which refer to and operate to regulate the popular vote for presidential elections.[2] These Amendments confirm Congress's concomitant authority to regulate voting in congressional *and* presidential elections—

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[2] Section 2 of the Fourteenth Amendment penalizes a state for denying the right to vote "for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof." And Section 1 of the Twenty-Fourth Amendment states, "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

powers the Supreme Court and federal appellate courts have long recognized.

Moreover, it is necessary and proper for Congress to regulate voter registration for presidential elections if it is to do so effectively for congressional elections. *Cf. United States v. Comstock*, 560 U.S. 126, 133 (2010). Under our system of "supreme national government with national officers," Congress may "insure that those officers represent their national constituency as responsively as possible." *Mitchell*, 400 U.S. at 124 n.7 (opinion of Black, J.). This power must include the ability to legislate as to all elections for federal office, including presidential elections. *See id.* A state's attempt to impose dual and disparate processes for registering to vote for different federal offices undermines that power. Congress, therefore, passed the NVRA under express constitutional grants to enforce the system of fair and equal elections contemplated by the framers. *ITCA*, 570 U.S. at 8, 13-14.

C. The NVRA Is a Permissible Exercise of Congress's Power to Enforce the Fourteenth and Fifteenth Amendments.

The NVRA is also a valid exercise of Congress's authority under the Fourteenth and Fifteenth Amendments. *See Condon v. Reno*, 913 F. Supp. 946, 962 (D.S.C. 1995) (holding that the NVRA's legislative history and text "are clear that Congress was utilizing its power to enforce the equal protection guarantees of the Fourteenth Amendment"); *id.* at 967 (Congress had a "sound basis" for concluding that the NVRA was an "appropriate means" to further Fourteenth and Fifteenth Amendment protections); *ACORN* v. *Edgar*, 880 F. Supp. 1215, 1221 (N.D. Ill. 1995), *aff'd in relevant part*, 56 F.3d at 791; *see also ACORN v. Miller*, 912 F. Supp. 976, 984 (W.D. Mich. 1995) ("Even

if the NVRA violated the Tenth Amendment, it would still pass Constitutional muster under the Fourteenth and Fifteenth Amendments."), *aff'd* 129 F.3d at 833.

Those holdings are well-founded. Congress passed the NVRA to combat "discriminatory and unfair registration laws" that "disproportionately harm voter participation by various groups, including racial minorities." 52 U.S.C. § 20501(a)(3). The legislative record includes findings that laws, policies, and practices had imposed barriers to minority applicants' ability to register to vote. *See, e.g.*, Staff of Subcomm. on Civ. & Const. Rights of the H. Comm. on the Judiciary, 98th Cong., 2d Sess., *After the Voting Rights Act: Registration Barriers* (Comm. Print 1984) (H.R. Ser. No. 18, at 2-5); S. Rep. No. 103-6, at 3, 17-18 (1993); *see also Condon*, 913 F. Supp. at 962-63; *Edgar*, 880 F. Supp. at 1221; *Miller*, 912 F. Supp. at 984. The NVRA responds to these problems by requiring uniform, nationwide procedures to prevent discriminatory administration of registration laws and make registration easier. S. Rep. No. 103-6, at 4 (1993) ("This Act seeks to remove the barriers to voter registration and participation under Congress' power to enforce the equal protection guarantees of the 14th Amendment to the Constitution.").

Such uniform rules are an effective way to enforce—and are well within Congress's scope of powers under—the Fourteenth and Fifteenth Amendments. *See Mitchell*, 400 U.S. at 283-84 (opinion of Stewart, J.); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). The Fourteenth and Fifteenth Amendments authorize Congress to "use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Katzenbach*, 383 U.S. at

324; *accord Morgan*, 384 U.S. at 651. Congress may thus adopt uniform, nationwide rules targeting practices with a discriminatory effect. *See Mitchell*, 400 U.S. at 132-33 (opinion of Black, J.) (upholding nationwide ban on literacy tests); *id.* at 216 (opinion of Harlan, J.) (same); *id.* at 283-284 (opinion of Stewart, J.) (same). The NVRA does just that. *See also* H.R. Rep. No. 103-9, at 3-4 (1993) (indicating that Congress passed the NVRA in part "to reduce [the] obstacles to voting to the absolute minimum while maintaining the integrity of the electoral process," as "low voter turnout in Federal elections poses potential serious problems in our democratic society.").

The State disregards this authority. And the cases it does cite are inapt. *See* Mot. at 23 n.7. For instance, in *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997), the Supreme Court observed that the congressional record on voter suppression abundantly supported legislative protection under the Fourteenth and Fifteenth Amendments in the course of concluding that the record on modern religious persecution was lacking by comparison. *See id.* at 518, 525-27, 530-31, 532-33. The State's disregard of the NVRA's text and ample legislative record is telling, and renders its bare *City of Boerne* citation particularly ill-founded. The State is similarly silent on how *Shelby County v. Holder*, 570 U.S. 529 (2013), and *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2003)—neither of which analyze the NVRA—apply here. *See* Mot. at 23 n.7.

II. The United States Has Stated a Claim That HB 2492 Violates the Materiality Provision of the Civil Rights Act.

The Materiality Provision prohibits any state action that denies individuals the

right to vote based on errors or omissions on "any record or paper relating to any application [or] registration" that are not material to the voter's qualifications. 52 U.S.C. § 10101(a)(2)(B). That a state may allow an otherwise eligible voter to cure an immaterial error or omission is irrelevant. The United States has adequately alleged that HB 2492 violates the Materiality Provision by requiring prospective voters to provide their birthplace and DPOC, and to attest to citizenship even if they have already provided DPOC, none of which are material to establishing the voter's qualifications to vote.

A. The Materiality Provision Applies to Codified State Laws.

The Materiality Provision bars a state from "deny[ing] the right of any individual to vote in any election" based on errors or omissions not material to a voter's qualifications. *Id.* The Provision applies whether a state passes or enforces a law requiring such denials or takes actions that exceed state law. Courts have regularly declined to dismiss Materiality Provision challenges to existing state laws. *See, e.g.*, *La Unión del Pueblo Entero (LUPE) v. Abbott*, No. 5:21-cv-844, 2022 WL 1651215, at *21 (W.D. Tex. May 24, 2022) (declining to dismiss challenge to statute requiring provision of an identification number matching voter record); *Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, 574 F. Supp. 3d 1260, 1282 (N.D. Ga. 2021) (declining to dismiss challenge to statute requiring provision of birthdate on absentee ballots and applications); *League of Women Voters of Ark. v. Thurston*, No. 5:20-cv-5174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021) (declining to dismiss challenge to law requiring rejection of materials based on omission of or inconsistencies in information on voter statement and application); *see also Wash. Ass'n of Churches v. Reed*, 492 F. Supp.

2d 1264, 1270 (W.D. Wash. 2006) (finding likelihood of success on challenge to state law requiring matching a voters' name to a database before registration).[3]

But Arizona contends that the Materiality Provision does not reach conduct codified in state law, just "ad hoc" practices that "exceed" state law. Mot. at 26-27. The State is incorrect. Nothing in the Materiality Provision's text supports that argument. Nor do the State's cited authorities hold that existing statutes are insulated from Materiality Provision challenges. *See Org. for Black Struggle v. Ashcroft*, 493 F. Supp. 3d 790, 802-03 (W.D. Mo. 2020); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308-09 (N.D. Ga. 2018).[4]

The State also wrongly suggests that Congress intended the Materiality Provision to bar only discriminatory application and administration of apparently nondiscriminatory laws. Mot. at 26. The Provision's text is clear: it does not refer to race or

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[3] Contrary to the State's contention, the weight of authority recognizes a private right of action to enforce the Materiality Provision. *See, e.g.*, *Schwier v. Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003); *LUPE v. Abbott*, No. 5:21-cv-0844, 2022 WL 3045657, at *30 (W.D. Tex. Aug. 2, 2022); *Thurston*, 2021 WL 5312640, at *4; *Brooks v. Nacrelli*, 331 F. Supp. 1350, 1352 (E.D. Pa. 1971).

[4] The court in *Organization for Black Struggle* did not reject all challenges to state laws; it simply agreed that the defendants' "rejection of ballot envelopes that are unclear as to the voter's name, address, and attestation" of authorization to vote, pursuant to state law, was not likely to violate the Materiality Provision. 493 F. Supp. 3d at 803. *Martin*, for its part, held that rejecting voters' absentee ballot envelopes based on their inability "to correctly recite [their] year of birth" thereon likely violated the Materiality Provision, because the state had already confirmed the voter's substantive qualifications through the absentee ballot application process. 347 F. Supp. 3d at 1308-09. The court said this conclusion "[was] only strengthened by the Georgia Supreme Court's explicit recognition that Georgia law 'does not mandate the automatic rejection of any absentee ballot lacking the elector's place and/or date of birth'"; it did not hold that any requirement Georgia law might impose would be permitted under the Materiality Provision. *Id.* at 1309 (citation omitted).

discrimination, but broadly forbids any denial of the right to vote based on immaterial errors and omissions. And Congress addressed discriminatory application and administration of laws through a different CRA provision. *See* 52 U.S.C. § 10101(a)(2)(A) (prohibiting states from "apply[ing] any standard, practice, or procedure different from . . . [those] applied under such law or laws to other individuals" qualified to vote). The Materiality Provision separately forbids election officials from denying the right to vote based on errors and omissions not material to voter qualifications. 52 U.S.C. § 10101(a)(2)(B).

Congress enacted the Materiality Provision to prohibit election officials from treating registration forms as tests for voters, rather than as a mechanism to gather information necessary to assess voters' qualifications. *See* 110 Cong. Rec. 1694 (1964) (statement of Rep. Emanuel Celler); *id.* at 6733 (statement of Sen. Philip A. Hart); *Schwier*, 340 F.3d at 1294 (explaining that Congress sought "to address the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters"); *see also United States v. Cartwright*, 230 F. Supp. 873, 876 (M.D. Ala. 1964) (finding the application form to be "a strict examination or test" when registration is denied "because of technical and inconsequential errors and omissions"). Whether officials do so on the basis of codified state laws or as the result of "ad hoc" decisionmaking "exceed[ing]" state law is irrelevant. The Materiality Provision targets *all* state conduct that denies the right to vote based on immaterial errors or omissions.

To be sure, errors or omissions must be "not material in determining whether [an individual] is qualified under State law" to vote. 52 U.S.C. § 10101(a)(2)(B). But this reference to "State law" addresses voters' substantive qualifications, which, in Arizona, include age, citizenship, residence, ability to write their name or make their mark, and criminal or incapacitated status. *See, e.g.*, *Migliori v. Cohen*, 36 F.4th 153, 163 (3d Cir. 2022) (explaining that a "requirement is material [under Pennsylvania law] if it goes to determining age, citizenship, residency, or current imprisonment for a felony"), *vacated as moot sub nom. Ritter v. Migliori*, No. 22-30, 2022 WL 6571686 (U.S. Oct. 11, 2022) (mem.); *Martin*, 347 F. Supp. 3d at 1308 ("the only *qualifications* for voting in Georgia are U.S. [c]itizenship, Georgia residency, being at least eighteen years of age, not having been adjudged incompetent, and not having been convicted of a felony"); *Wash. Ass'n of Churches*, 492 F. Supp. 2d at 1270 (similar).

Accordingly, by its terms and history, the Materiality Provision bars state laws—such as HB 2492—that deny the right to vote based on errors or omissions in completing registration forms that do not bear on a voter's substantive qualifications. Arizona's novel and unsupported arguments to the contrary must be rejected.

B. The Availability of a Cure Process Does Not Save HB 2492.

Arizona argues that HB 2492 does not violate the Materiality Provision because affected voters might be able to cure the errors or omissions that required their registration materials to be rejected. Mot. at 3, 27. Not so. Nothing in the Provision's text requires a state's improper rejection of registration materials to be absolute and final before a violation can occur. *See* 52 U.S.C. § 10101(a)(2)(B). By the statute's plain

terms, a violation occurs whenever voting materials are rejected based on errors or omissions immaterial to a voter's qualifications, *id.*, regardless of the would-be voter's ability to try to fix the problem. *See LUPE*, 2022 WL 1651215, at *21 (rejecting argument because the Materiality Provision "does not say that state actors may initially deny the right to vote based on errors or omissions that are not material as long as they institute cure processes"); *Kemp*, 574 F. Supp. 3d at 1282.[5] As alleged, HB 2492 violates the Materiality Provision because it requires the rejection of registration applications based on such immaterial errors or omissions. Compl. ¶¶ 66-71.

C. The Complaint Sufficiently Alleges That HB 2492 Violates the Materiality Provision.

The United States has adequately alleged that HB 2492 imposes restrictions on

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[5] In *Vote.Org v. Callanen*, 39 F.4th 297 (5th Cir. 2022), the Fifth Circuit stayed pending appeal a district court decision permanently enjoining Texas's wet signature rule as a violation of the Materiality Provision. The Fifth Circuit reasoned that a wet signature was likely material because Texas qualifications included whether one was "a registered voter," and state law required an original, wet signature on registrations submitted by fax. *Id.* at 306-07. The court further reasoned that it was "hard to conceive how [a] wet signature rule deprives anyone of the right to vote" where state law "confers a right to cure and allows other means of registration." *Id.* at 305-06. The court has not yet issued a decision on the merits of this appeal, and decisions on stay motions are not binding on the merits panel. *See, e.g.*, *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 176 (5th Cir. 2020).

In any event, the court's analysis is incorrect. It would allow states to make any immaterial requirement material simply by codifying it as a part of their registration process, thus subverting the very purpose of the Materiality Provision. *Schwier*, 340 F.3d at 1294. And with respect to cure processes, the court's reasoning hinged on the availability of other means of registration. In this case, HB 2492 provides *no* such alternatives. In order to register to vote in state elections by any means, applicants must provide their birthplace and check a box affirming their citizenship, even if they have provided DPOC; and to register to vote in presidential elections and by mail ballot, applicants must provide DPOC.

eligible U.S. citizens' ability to register and vote based on errors or omissions in voter registration papers that are not material to determining voter qualifications. A voting requirement is material if it goes to determining a voter's substantive qualifications to vote. *See, e.g.*, *Martin*, 347 F. Supp. 3d at 1308; *Wash. Ass'n of Churches*, 492 F. Supp. 2d at 1270. In Arizona, these qualifications include age, citizenship, residency, ability to write one's name or make one's mark, and lack of criminal convictions or adjudications deeming one incapacitated. Ariz. Const. art VII, § 2, cl. A; Ariz. Rev. Stat. § 16-101.

For a requirement to be material to voter qualifications, it must be more than merely relevant. *Cf. Cone v. Bell*, 556 U.S. 449, 469-70 (2009) (defining materiality for purposes of *Brady* violations as "a reasonable probability that . . . the result of the proceeding would have been different"); *Kungys v. United States*, 485 U.S. 759, 771-72 (1988) (defining materiality for purposes of the Immigration and Nationality Act as "predictably capable of affecting" an official decision); *United States v. Uchimura*, 125 F.3d 1282, 1285 (9th Cir. 1997) (defining materiality for purposes of tax fraud cases as "necessary to a determination of whether" tax is owed).[6]

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[6] Contrary to the State's claims, neither *Gonzalez v. Arizona*, No. 06-cv-1268, 2007 WL 9724581 (D. Ariz. Aug. 28, 2007), nor *Diaz v. Cobb*, 435 F. Supp. 2d 1206 (S.D. Fla. 2006), defines materiality as simple relevance. While *Gonzalez* states that *citizenship* is material, it does not explain why provision of DPOC, beyond an attestation, is material. 2007 WL 9724581, at *2. *Diaz*, for its part, explicitly did *not* address "an applicant's failure to re-answer a question that is asked twice in the same way," concluding simply that the "information conveyed by check-boxes and the oath" at issue there was "not the same" since the oath "contains a general affirmation of eligibility," while the "check-boxes contain specific affirmations of specific qualifications." 435 F. Supp. 2d at 1212-13. And even a case that considered whether "material" could mean "minimal relevance," without deciding, treated relevance as requiring that information "ha[ve] a

If all requirements a state could conceive of as relevant were also considered material, states could require prospective voters to prove each qualification via several methods and deny their right to vote if they fail to complete just one. But courts set a higher standard than mere relevance, finding unnecessary or duplicative requirements immaterial to voting qualifications. *See LUPE*, 2022 WL 1651215, at *21 (finding plaintiffs had plausibly alleged state law requiring provision of identification number "may require information that is unnecessary and therefore not material to determining an individual's qualifications to vote under Texas law"); *Martin*, 347 F. Supp. 3d at 1309 (finding provision of birth year on a ballot envelope immaterial where a voter's eligibility was confirmed in earlier application process); *Thurston*, 2021 WL 5312640, at *4 (upholding Materiality Provision claim "where State law requires absentee voters to provide some [required] information several times and . . . they have correctly provided that information at least once"). Doing otherwise undercuts the Materiality Provision's purpose. *See Schwier*, 340 F.3d at 1294.

Under HB 2492, as alleged here, applicants' State Form registration applications will be rejected if the applicants omit their birthplace, despite one's birthplace having no material bearing on one's qualifications to vote. Compl. ¶¶ 48-56, 67. The State suggests that this requirement is material to the citizenship qualification because it "helps define what sort of proof can serve to demonstrate citizenship." Mot. at 28. But even persons born in the United States—and with U.S. birth certificates—might not be citizens

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natural tendency to influence" the outcome of an analysis. *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008) (citations omitted).

if born to foreign diplomatic officers, *see* 8 C.F.R. § 101.3(a)(1), or if they lose citizenship through expatriation. Similarly, individuals born abroad might be U.S. citizens without having naturalization papers if they were born to citizen parents. *See* Compl. ¶ 52.

Arizona has not previously considered birthplace necessary to demonstrate citizenship. Registration applications in Arizona have never before been rejected for omitting a voter's birthplace, though birthplace has long been included on the State Form. *See* Compl. ¶ 49; *cf. Ford v. Tenn. Senate*, No. 06-2031, 2006 WL 8435145, at *11 (W.D. Tenn. Feb. 1, 2006) (finding a requirement that voters sign ballot applications and poll books immaterial because the state "ha[d] in the past treated the failure to sign" as such); *see also Migliori*, 36 F.4th at 164 (holding that a date requirement was immaterial in part because the State accepted materials including incorrect dates).

In addition, the United States' complaint also adequately alleges that HB 2492 violates the Materiality Provision because even voters who have *already provided* DPOC will have their materials rejected based on a simple failure to *also* check a box affirming their citizenship on the State Form. The State argues that this requirement is material only because it "is a minimally burdensome affirmation by the voter" that they have fulfilled the citizenship qualification. Mot. at 28. But the relative burden a requirement imposes is irrelevant in assessing its materiality.[7] Since voters who have supplied DPOC have already demonstrated their citizenship, the checkmark provision amounts to a purely

[7] In any event, how weighty this burden might be is a factual question not suitable for consideration on a motion to dismiss. *Iqbal*, 556 U.S. at 678.

technical requirement that voters be able to read and precisely follow instructions on how to complete their registration. Compl. ¶ 59. It is therefore immaterial—a conclusion only bolstered by the fact that the State *already knows* the applicant is a citizen.

Finally, the United States has adequately alleged that HB 2492 violates the Materiality Provision because both new and existing federal-only voters' registration to vote in presidential elections will be rejected if they fail to provide DPOC in addition to an attestation of citizenship. Arizona says simply that "[p]roof of citizenship attests that a voter is indeed eligible." Mot. at 28. But federal-only voters have already provided that attestation on the Federal Form, which Arizona considers sufficient to demonstrate citizenship for federal-only voters who vote in person for congressional elections. There are no additional substantive citizenship requirements for presidential or mail voters—such as length or type of citizenship—that DPOC might be necessary to prove. *See* Ariz. Const. art VII, § 2, cl. A; Ariz. Rev. Stat. § 16-542. Thus, if DPOC is not material to establishing a voter's qualification to vote in a congressional contest, it is equally not material as to that same voter seeking to vote in a presidential election or by mail. HB 2492's DPOC requirement is therefore not only unnecessary and duplicative, it is illogical as well. As such, it violates the Materiality Provision. *See LUPE*, 2022 WL 1651215, at *21; *Martin*, 347 F. Supp. 3d at 1309; *Thurston*, 2021 WL 5312640, at *4.

CONCLUSION

For the foregoing reasons, the State's Motion to Dismiss the United States' Complaint should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to counsel of record.

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